Province of
British Columbia

1986

Report on

The Action *Per Quod Servitium Amisit*

LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

87-02372/

LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON THE ACTION *PER QUOD SERVITIUM AMISIT*

LRC 89

November 1986

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

The Commissioners are:

ARTHUR L. CLOSE, *Chairman*

MARY V. NEWBURY

LYMAN R. ROBINSON, Q.C.

PETER T. BURNS, Q.C.

Thomas G. Anderson is Counsel to the Commission.

The Commission's legal research officers are J. Bruce McKinnon and Deborah Cumberford.

Sharon St. Michael is Secretary to the Commission.

The Commission offices are located at Suite 601, Chancery Place, 865 Hornby Street, Vancouver, B.C. V6Z 2H4.

Canadian Cataloguing in Publication Data

Law Reform Commission of British Columbia
Report on the action per quod servitium amisit

Includes bibliographical references.
"LRC 89".
ISBN 0-7718-8549-0

1. Master and servant - British Columbia. 2. Damages - British Columbia. 3. Actions and defenses - British Columbia. I. Title. II. Title: The action per quod servitium amisit.

KEB290.A72L38 1986 346.71103 C87-092019-7

TABLE OF CONTENTS

	Page
I Introduction	7
A. Relational Interests	7
B. The Action *Per Quod Servitium Amisit*	7
C. The Scope of This Report	7
II The Current Law	9
A. Introduction	9
B. The Husband's Right of Action	9
C. The Parent's Right of Action	10
D. Employers	10
1. Introduction	10
2. The Action's Status in Canada	11
3. Recoverable Damages	11
(a) Valuing Lost Services	11
(i) Wages and Substitutes	11
(ii) Lost Profits	12
(iii) Recovery by an Injured Proprietor	12
(b) Special Damages	12
E. Summary	12
III The Case for Reform	13
A. Introduction	13
B. What Interests Does the Action *Per Quod* Protect?	13
1. Should the Action Protect the Employer's Economic Interests?	15
2. Is There A Need For An Action Akin to Subrogation In This Context?	16
(a) The Collateral Benefits Rule	16
(b) Benefits Derived From the Workplace	16
(c) Wages	17
C. The Need For the Action *Per Quod*	18
D. Summary	19
IV Reform	20
A. Recommendation	20
B. Acknowledgments	20

To the Honourable Brian R. D. Smith, Q.C.
Attorney General of the Province of British Columbia:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
THE ACTION *PER QUOD SERVITIUM AMISIT*

The action *per quod servitium amisit* permits a person to recover damages for loss of services from a person who injures his servant. The action is anomalous in many respects, and has been subject to criticism by the Chief Justice of the Supreme Court of Canada and by the Chief Justice of the Supreme Court of British Columbia. This Report examines the contemporary relevance and utility of the action and concludes that it is an anachronism which should be abolished.

CHAPTER I INTRODUCTION

A. Relational Interests

When a person is injured by another, the law's principal concern is to ensure that he is compensated for his losses. What is frequently overlooked is that others may also suffer financially. For example, the victim's employer may suffer business losses. The victim's family may be deprived of support or put to additional expense caring for him.

Persons suffering loss consequent upon injury to another are frequently unprotected. Their interests are termed "relational interests."[1]

> The most ingrained opposition is against recovery for injury to relational interests. Generally, the law has considered itself fully extended by affording compensation only to persons immediately injured, such as the accident victim himself, without going to the length of compensating also third persons who, in consequence, incur expenses or lose their livelihood, support or expected benefits from their association with him. The reason for this is not so much that these claims are for pecuniary detriment as that the burden of compensating anyone besides the actual casualty is feared to be unduly oppressive because most accidents are bound to entail repercussions, great or small, upon all with whom he had family, business or other valuable relations.

B. The Action *Per Quod Servitium Amisit*

A significant exception to the rule against recovery for injury to relational interests is the action *per quod servitium amisit*, which dates from medieval England.[2] The action is for damages for loss of services. It permits a master to claim compensation for damages arising from injury to his servant.[3]

At one time the master-servant relationship was the basis of all domestic relationships, extending to wife and children as well as hired help. An employer, husband or parent was considered to have a proprietary interest in his employee, wife or child.[4] The action has evolved so that the master's proprietary right is considered to be in the services rather than the person of the servant.[5] Even this notion is unusual in a modern context.

C. The Scope of This Report

The continued existence of the *per quod* action has been criticized recently by both Chief Justice Dickson of the Supreme Court of Canada and Chief Justice McEachern of the British Columbia Supreme Court. In *The Queen* v. *Buchinsky*, Dickson C.J.C. states:[6]

> Counsel in this case did not argue that the action *per quod servitium amisit* is no longer a valid cause of action. Whether it still should be recognized has been for some time the subject of debate in the cases and among academic commentators. The conceptual underpinnings of the action are the main reason its validity has been brought into question . . . The debate is not whether the original assumptions underlying the action can any longer be supported. That rationale is plainly

---

[1] J. Fleming, *The Law of Torts*, (5th ed. 1977) 170-1.

[2] *Ibid.*, at 672-3; P. Handford, "Relatives Rights and *Best* v. *Samuel Fox*," (1979) 14 U.W.A.L.R. 79, 106. For an historical introduction to the *per quod* action, *see* P. Brett, "Consortium and Servitium: A History and Some Proposals," (1955) 29 A.L.J. 321, 389, 428; G.H. Jones, "Per Quod Servitium Amisit," (1958) 74 L.Q.R. 39. Another significant exception, not discussed in this Report, is the action afforded the spouse or child of a deceased person under the *Family Compensation Act*, R.S.B.C. 1979, c. 120.

[3] R.F.V. Heuston, *Salmond on Torts*, (16th ed. 1973) 354.

[4] P. Handford, *supra*, n. 2; B. Hansen and D. Mullan, "Private Corporations in Canada: Principles of Recovery for the Tortious Disablement of Shareholder/Employees" in Klar, ed., *Studies in Canadian Tort Law*, (1977) 215, 218-19; J. Irvine, "The Action Per Quod Servitium Amisit in Canada", (1980) 11 C.C.L.T. 241, 242; *Salmond*, *supra*, n. 3 at 354-55. *See infra*, ch. II, n. 8.

[5] *Comm'r for Rys (N.S.W.)* v. *Scott*, (1958-9) 102 C.L.R. 392, 450, [1959] Argus L.R. 896 (Aust. H.C.).

[6] *The Queen* v. *Buchinsky*, (1983) 1 S.C.R. 481, 490, 145 D.L.R. (3d) 1, [1983] 5 W.W.R. 577.

> offensive in today's society. The serious question is whether, despite its antiquated origins, the action can now find a different justification.

In *Attorney General of Canada* v. *Szaniszlo*, McEachern C.J.S.C. comments on the above quotation:[7]

> I think Dickson J. was suggesting that this archaic action should be abrogated by legislation. Many judges share that view. But this is a decision for the legislature, for it would be unseemly, to say the least, for a trial court judicially to attempt a change of law in the guise of reform which the Supreme Court of Canada has identified but declined to undertake.

The central issue addressed in this Report is whether the action *per quod* should be retained or revised. This inquiry involves a consideration of the action in the general context of the law. Chief Justice Dickson summarized some of the issues which might be considered in this regard:[8]

> Does it serve a useful purpose that would not otherwise be met? Is it consistent with general principles of tort law concerning collateral benefits and recovery for economic loss? Do employers, simply because they are employers, merit a special cause of action? Should the action *per quod servitium amisit* be abandoned, maintained or expanded?

These issues are addressed in the balance of this Report.

---

[7] (1985) 69 B.C.L.R. 96, 99-100 (S.C.).

[8] *Supra*, n. 6 at 490.

A. Introduction

The action *per quod* has three manifestations: the husband's action for injury to his wife; the parent's action for injury to his or her child; and the employer's action for injury to his employee.

The link between these apparently unrelated rights of action is no longer an obvious one. It is useful to discuss these three aspects of the action *per quod* separately.

B. The Husband's Right of Action

At common law, a husband had a right to his wife's services. Injury to the wife which impaired her ability to provide services was actionable.[1] The recovery of damages for loss of services arising from injury to her husband, however, was never open to a wife.[2] The common law did not recognize a duty on the husband to provide services to his wife.

In British Columbia, this right of action is now precluded by section 75 of the *Family Relations Act*:[3]

> **Abolished Remedies**
>
> **75.** No action shall be maintained for . . . loss of consortium.

Consortium is a term which denotes many aspects of marriage, including companionship, affection and intercourse.[4] *Guelph* v. *Samuelson* held that *consortium* also includes *servitium*, the services, such as housekeeping and cooking, which a wife might provide her husband:[5]

> The action for loss of consortium includes several losses, of which servitium is one.

It is difficult to say whether the legislature intended to restrict the ambit of the action *per quod* by the enactment of section 75. Perhaps that consequence was accidental rather than intentional.[6] In any event, this alteration to the law is difficult to view as anything but beneficial.

In keeping with the general principles of tort law, a wife can recover in her own right for the cost of replacement housekeeping or babysitting services necessitated by an injury; if she is working outside the home, she can recover for lost wages.[7] Abolishing a husband's right to recover for loss of a wife's services affected not the actual damages recoverable, but who could recover them.

---

[1] R.F.V. Heuston, *Salmond on Torts*, (16th ed., 1973) 360; J. Fleming, *The Law of Torts*, (5th ed., 1977) 641.

[2] *Best* v. *Samuel J. Fox & Co.*, [1952] A.C. 716, [1952] 2 All E.R. 394, 401 (H.L.).

[3] R.S.B.C. 1979, c. 121.

[4] Fleming, *supra*, n. 1; B. Feldthusen, "Pure Economic Loss Consequent Upon Physical Damage to a Third Party," (1977) 16 W. Ont. L. Rev. 1, 59.

[5] (1976) 25 R.F.L. 394, 396 (B.C.S.C.), following *Best* v. *Samuel J. Fox & Co.*, *supra*, n. 2.

[6] The Hansard Reports from 1972, when the section was first enacted as S.B.C. 1972, c. 20, s. 4(1), and from 1978, when the revised *Family Relations Act* was under consideration, suggest that the full consequences of the section were not foreseen: Hansard Reports Legislative Assembly of B.C., 3rd Session, 29th Parliament, at 649 (Feb. 28th, 1972): comments of Attorney General of B.C., Mr. Peterson; Hansard Reports, Legislative Assembly of B.C., 3rd Session, 31st Parliament at 2695 (June 27, 1978): comments of Mr. Lauk and Mr. Gordon.

[7] *Andrews* v. *Arnot*, (1972) 27 D.L.R. (3d) 49 (B.C.S.C.); *Milroy* v. *Turner*, [1985] B.C.D. Civ. 3374-02 (B.C.S.C.); *Stein* v. *Symonds*, [1985] B.C.D. Civ. 3374-22 (B.C.S.C.).

C. The Parent's Right of Action

The common law views the relationship between parent and child as including, or analagous to, the relationship of master and servant.[8] A parent, consequently, is entitled to bring an action for compensation for loss of a child's services.[9] There must be an actual loss of services, although they can be as minimal as making tea.[10] A claim by a parent for the value of lost services arising from injury to a child does not appear to have been made in British Columbia.

The action *per quod* in this context is probably unaffected by section 75 of the *Family Relations Act*.[11] "Consortium" is not descriptive of a parent's rights in his or her child.[12] In any event, it would appear that the action *per quod* is of little contemporary value to parents.[13]

D. Employers

1. Introduction

The third branch of the action *per quod*, and the one we are chiefly concerned with, is the employer's action for loss of an employee's services.

In the fourteenth century, when the action originated, 'employees' or servants were usually members of the master's household.[14] His obligation to support them would continue despite their inability to work, so that injury to a servant often resulted in a direct loss to him.[15]

In England, the application of the action *per quod* was limited to members of the household, including menial or domestic servants, by the 1956 decision of the Court of Appeal in *Inland Revenue Commissioners* v. *Hambrook*.[16] This decision influenced several jurisdictions, which limited the action in a like manner.[17] However, subsequent cases in Australia,[18] New Zealand[19] and Canada,[20] including a recent British Columbia decision,[21]

---

[8] B. Hansen and D. Mullan, "Private Corporations in Canada: Principles of Recovery for the Tortious Disablement of Shareholder/Employees" in Klar, ed., *Studies in Canadian Tort Law*, (1977) 215, 218-19; J. Irvine, "The Action Per Quod Servitium Amisit in Canada," (1980) 11 C.C.L.T. 241, 242; W. Prosser, *Handbook of the Law of Torts*, (3d ed., 1964) 906-7; *Salmond*, *supra*, n. 1 at 354-55. *Cf.* P. Brett, "Consortium and Servitium: A History and Some Proposals," (1955) 29 A.L.J. 321, 322. Some authors maintain that the father had no property interest in his children, and the master-servant relationship between parent and child was merely a fiction used to extend the application of the *per quod* action to children: *see* Fleming, *supra*, n. 1 at 638.

[9] Either parent may recover: P. Handford, "Relatives Rights and *Best* v. *Samuel Fox*," (1979) 14 U.W.A.L.R. 79 at 106-07; Hansen and Mullan, *supra*, n. 8 at 243.

[10] *Carr* v. *Clarke*, (1818) 2 Chit. 260; A.L. Armitage, ed., *Clerk & Lindsell on Torts*, (13th ed., 1969) 442.

[11] *Supra*, n. 3.

[12] Prosser, *supra*, n. 8 at 904-5; J. King, "Torts Comment" (1976) 24 Kansas L. Rev. 432, 445.

[13] First, accident victims may now recover for their own losses, including lost wages and impaired earning capacity: *see Arnold* v. *Teno*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609, 19 N.R. 1, 3 C.C.L.T 272; *Thornton* v. *Prince George Bd. of S. Trustees*, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480, [1978] 1 W.W.R. 607, 19 N.R. 552, 3 C.C.L.T. 257. Second, medical expenses incurred by a parent on behalf of an injured child are recoverable independantly of a *per quod* action as special damages. Under s. 56 of the *Family Relations Act*, R.S.B.C 1979, c. 121, parents have a legal duty to maintain their child: *see Kirkham* v. *Boughey*, [1957] 3 All E.R. 153 (Q.B.); *Sheasgreen* v. *Morgan*, [1951] 3 W.W.R. (N.S.) 677 (B.C.S.C.); *Dean* v. *Law*, (1964) 50 D.L.R. (2d) 770 (B.C.S.C.).

[14] A.G. Guest, "Comment," (1956) 34 C.B.R. 1078, 1080.

[15] *Ibid.*

[16] [1956] 3 All E.R. 338 (C.A.). The action has since been abolished in England by the *Administration of Justice Act*, 1982, s. 2.

[17] Manitoba, Nova Scotia. *See Pagan* v. *Leifer*, (1969) 6 D.L.R. (3d) 714, 69 W.W.R. 247 (Man. Q.B.); *Schwartz* v. *Hotel Corpn. of Amer.*, *infra*, n. 38; *Swift Can. Co. Ltd.* v. *Bolduc*, (1961) 29 D.L.R. (2d) 651 (N.S.S.C.).

[18] *Comm'r for Rys (N.S.W.)* v. *Scott*, (1958-59) 102 C.L.R. 392, [1959] Argus. L.R. 896 (Aust. H.C.).

[19] *Attorney General (N.Z.)* v. *Wilson & Horton Ltd.*, [1973] 2 N.Z.L.R. 228 (C.A.).

[20] *The Queen* v. *Buchinsky*, [1983] 1 S.C.R. 481, 145 D.L.R. (3d) 1, [1983] 5 W.W.R. 577; *Genereux* v. *Peterson Howell & Heather (Can.) Ltd.*, (1972) 34 D.L.R. (3d) 614, [1973] 2 O.R. 558 (Ont. C.A.); *Gibson* v. *Dool*, (1970) 12 D.L.R. (3d) 325, 332, [1970] 3 O.R. 60 (Dist. Ct.), which states:

> Wherever the master-servant relationship exists, whether such relationship is created by statute or exists at common law, then the action *per quod* lies without the limitations thought to be imposed upon it by *Hambrook*.

[21] *Chambers* v. *Miles*, [1978] 3 W.W.R. 188 (B.C.S.C.), overruling *Flakstad* v. *Wright*, [1971] 5 W.W.R. 697 (B.C.S.C.).

found *I.R.C.* v. *Hambrook* to be inaccurate from an historical perspective and declined to follow its reasoning. As several legal historians have pointed out, the action evolved so that it applied not only to domestic relations but also to all master-servant relationships.[22]

The English Law Reform Committee studied the *per quod* action after *I.R.C.* v. *Hambrook* was decided.[23] It considered expanding the action to encompass all employer-employee relationships, but came to the conclusion that abolition was preferable.[24] The action was abolished in England in 1982.[25] New Zealand abolished the action in 1973.[26]

2. The Action's Status in Canada

In Canada, the *per quod* action still exists, and extends to all master-servant relationships.[27] The action is clearly still maintainable in British Columbia.[28]

3. Recoverable Damages

An employer may recover the value of lost services as well as out of pocket expenses incurred as a result of injury to an employee.[29] For the most part, however, an employer is entitled to recover damages for a particular loss only when the employee is unable to recover in his own right for that loss.[30]

(a) Valuing Lost Services

Several approaches have been adopted for valuing lost services.

(i) Wages and Substitutes

If the employer continues to provide wages to an employee who is absent due to injury, the wages or salary paid are usually recoverable as a *prima facie* measure of the services lost.[31] In a case such as *Genereux* v. *Peterson Howell & Heather (Canada) Ltd.*[32] or *Chamber* v. *Miles*,[33] where the injured employee was working for free, the wages paid to a substitute employee are

---

[22] G.H. Jones, "Per Quod Servitium Amisit," (1958) 74 L.Q.R. 39; Brett, *supra*, n. 8 at 324-25. Guest, *supra*, n. 14 at 1080-81 states:

> Even in the seventeenth century, in *Robert Marys's Case*, where the emphasis is seen to have shifted from the master's proprietary interest in the servant to the economic damage sustained by the loss of his services, it was still true to say that most contracts of service would take place in the domestic or agricultural sphere. But there is nowhere during this period any express limitation to menial servants as such. . . . One has only to look at the cases decided between 1750 and 1850 to see that the action was not so confined. A master could and did recover damages for the loss of the services of a journeyman shoemaker, a journeyman currier, a powder-flask maker, an apprentice, a "servant and traveller", a Crown glass maker, as well as members of his own family.

[23] Eleventh Report, *Loss of Services, etc.*, (1963) Cmnd. 2017.

[24] *Ibid.*, at 11. In England, the Law Commission and the Pearson Commission also proposed abolition of the action: Law Com. No. 56, *Report on Personal Injury Litigation — Assessment of Damages*, (1973); Royal Commission on Civil Liability and Compensation for Personal Injury, *Report*, (1978) Cmnd. 7054.

[25] *Law Reform (Miscellaneous Provisions) Act, 1970*, (U.K.) 1970, c. 33, s. 5.

[26] *Domestic Actions Act, 1975*, (N.Z.) 1975, No. 53, s. 4.

[27] *The Queen* v. *Buchinsky*, *supra*, n. 20. The relationship of master and servant was created between the Federal Crown and the Armed Forces by the *Exchequer Court Act*, S.C. 1943-44, c. 25, s. 50A, now the *Federal Court Act*, R.S.C. 1970, c. 1, s. 37:

> For the purpose of determining liability in any action or other proceeding by or against the Crown, a person who was at any time a member of the Canadian Forces or of the Royal Canadian Mounted Police shall be deemed to have been at that time a servant of the Crown.

[28] *Chambers* v. *Miles*, *supra*, n. 21.

[29] *Attorney General* v. *Valle-Jones*, [1935] 2 K.B. 209. *Also see Flemington* v. *Smithers*, (1826) 2 C.&P. 292, 172 E.R. 131, as cited by Fleming, *supra*, n. 1 at 675. *Cf. Edmonson* v. *Machell*, (1787) 2 T.R. 4, 100 E.R. 2; *Savill* v. *Kirby*, (1716) 10 Mod. 384, 88 E.R. 774.

[30] Medical expenses, in cases involving the Canadian Armed Forces, are an exception to this rule: *see*, *Attorney General of Canada* v. *Szaniszlo*, (1985) 69 B.C.L.R. 96 at 103-4 (S.C.).

[31] S.M. Waddams, *The Law of Damages*, (1983) at 171-2; Fleming, *supra*, n. 1 at 675.

[32] *Supra*, n. 20.

[33] *Supra*, n. 21.

recoverable as an alternative measure of damages.[34] In both cases the employee, having suffered no loss of wages, would be unable to recover.

(ii) Lost Profits

In a few cases the employer's damages have been assessed as the loss of profits attributable to the employee's injury.[35] However, in *Genereux* the Ontario Court of Appeal declined to assess damages on that basis. The court held that the employer's loss of profits was an unforeseeable consequence of the tortfeasor's actions and was for that reason unrecoverable.[36]

It has been argued that lost profits is an appropriate measure of an employer's damages:[37]

> All the claims an employer can legitimately advance against a tortfeasor surely relate to diminished profit in the last analysis. And naturally so, for what compensable interest can a master conceivably enjoy in the servant, except in relationship to the latter's profit generating function?

(iii) Recovery by an Injured Proprietor

Loss of profits is an appropriate measure of the value of lost services when the injured employee is the sole proprietor or controlling shareholder of the company to which loss accrues:[38]

> If the plaintiff is sole proprietor or controlling shareholder, and it can be shown that a loss to the business is a loss to the plaintiff, profits are recoverable.

The profits are recoverable by the injured employee so that an action by the company is unnecessary. The judiciary is willing to lift the corporate veil to make such an award.

(b) Special Damages

A further accepted head of damages is an employer's out of pocket expenses incurred on behalf of the injured employee. For the most part, however, special damages may also be recovered by the injured employee, either in his own right or on behalf of his employer.[39]

E. Summary

The action *per quod* appears to have little or no contemporary utility with respect to the recovery of damages suffered as a result of injury to, and the loss of services of, a wife or child. This is not surprising, since the philosophical basis of the action is inconsistent with modern views of the nature of these relationships. Instead, the focus of the law has been to ensure that the person injured is adequately compensated for his or her injuries.

The action, however, retains some vitality in the context of its origin. An employer may suffer loss as a result of injury to his employee, and the action *per quod* occasionally serves to recover compensation for such losses.

---

[34] Waddams, *supra*, n. 31 at 172; *Genereux*, *supra*, n. 20 at 626 (D.L.R.); followed in *Chambers* v. *Miles*, *supra*, n. 21.

[35] *Mankin* v. *Scala Theodrome*, [1947] K.B. 257, [1946] 2 All E.R. 614 (K.B.); *Bursey* v. *Avis Transport of Canada Ltd.*, (1970) 1 Nfld. & P.E.I.R. 131 (Nfld. S.C.T.D.); *Gibson* v. *Dool*, *supra*, n. 20; *Bermann* v. *Occhippinti*, [1954] 1 D.L.R. 560, [1953] O.R. 1035 (H. C); *Kneeshaw* v. *Lasendorff*, (1965) 54 D.L.R. (2d) 84, 54 W.W.R. 672 (Alta. S.C.). *See also Lumley* v. *Gye*, (1853) 2 El. & Bl. 216, 118 E.R. 749, 28 Q.B. 216; *Hewitt* v. *The Ontario Copper Lighting Rod Co.*, (1879) 44 U.C.R. 287 (Q.B.) (enticement and procurement of a servant). For a thorough examination of recovery for lost profits, *see* Hansen and Mullan, *supra*, n. 8 at 225-231.

[36] *Supra*, n. 20 at 627-8 (D.L.R.).

[37] Irvine, *supra*, n. 8 at 247.

[38] *Schwartz* v. *Hotel Corp. of America*, (1970) 15 D.L.R. (3d) 764, 75 W.W.R. 664, *aff'd.* (1971) 20 D.L.R. 759, [1971] 3 W.W.R. 320 (Man. C.A.). *Everett* v. *King*, [1982] 1 W.W.R. 561 (B.C.S.C.), citing *Johnstone* v. *Melina*, [1975] 3 W.W.R. 655 (B.C.S.C.).

[39] For example, medical expenses will generally be recovered by the injured party. *Donnelly* v. *Joyce*, [1974] Q.B. 454, [1973] 3 All E.R. 475 (C.A.) holds that a legal obligation to reimburse the benefactor is unnecessary to support recovery by the injured party.

A. Introduction

In the last chapter, it was observed that the action *per quod* retains some significance only in the sphere of compensating an employer for loss arising from injury to his employee. Even in this context, however, the action is rarely used to recover compensation.

Whether the action *per quod* is desirable to retain, perhaps in a modified form, involves a consideration of two separate issues:

(i) what interests does the action *per quod* protect?

(ii) is the action *per quod* needed to protect those interests?

B. What Interests Does the Action *Per Quod* Protect?

When an employee is injured, it is likely that his employer will suffer some economic loss. In most cases, the employee's services can be replaced, and any loss suffered by the employer is likely to be moderate. Where an employee may not be easily replaced, the employer may off-set the possibility of loss by obtaining insurance.[1]

The action *per quod servitium amisit* is a right of action which arises where a master has lost services. That is the justification for bringing the action, but does not necessarily indicate the nature of damages that are recoverable. It is sometimes said that the action is for the recovery of the value of lost services,[2] but this is misleading.[3]

When a servant is injured, there are two approaches to assessing the master's loss. The first is to compensate him for his out of pocket expenses. These might include continued wages, room and board and various other expenses such as the cost of medical care.[4] Where a substitute was hired for the injured servant, the costs incurred in that respect, insofar as they exceeded the costs that would have been incurred had the servant not been injured, would be recoverable.[5] Out of pocket expenses of these kinds would be classified as "special damages."

The second approach is to provide compensation for out of pocket expenses and for related losses in the nature of profit.[6] Recovery of economic losses would be classified as "general damages."

Case law supports both approaches.[7] Where a master recovers damages in the amount of payments made to or on behalf of an injured servant, he is recovering "special damages." Cases which fall into this category[8] essen-

---

[1] S.M. Waddams, *The Law of Damages (1983) at 173; B. Hansen and D. Mullan, "Private Corporations in Canada: Principles of Recovery for the Tortious Disablement of Shareholder/Employees"* in Klar, ed., *Studies in Canadian Tort Law*, (1977) 215, 246; English Law Commission, Working Paper No. 19: *The Action for Loss of Services, Loss of Consortium, Seduction and Enticement (1968) at 12.*

[2] *Genereux* v. *Peterson Howell & Heather (Can.) Ltd.*, (1972) 34 D.L.R. (3d) 614, [1973] 2 O.R. 558 (Ont. C.A.); *Waddams, supra*, n. 1 at 171; R.F.V. Heuston, *Salmond on Torts*, (16th ed., 1973) at 357; J. Fleming, *The Law of Torts*, (5th ed., 1977) 675.

[3] The value of lost services, and placing a value on the loss of services, is not necessarily the same: *see Waddams, supra*, n. 1 at 171-2; *Salmond, supra*, n. 2; *Attorney General (N.Z.)* v. *Wilson & Horton Ltd.*, [1973] 2 N.Z.L.R. 238, 250, *per* Turner J.

[4] *Bradford Corporation* v. *Webster*, [1920] 2 K.B. 135; *Attorney General* v. *Valle-Jones*, [1935] 2 K.B. 209 [1935] All E.R. 175 (K.B.); *McGregor on Damages*, (14th ed., 1980) at 850-51.

[5] *Fleming, supra*, n. 2; Waddams, *supra*, n. 1 at 172-73.

[6] *Ibid.*

[7] *Attorney General (N.Z.)* v. *Wilson & Horton Ltd.*, *supra*, n. 3.

[8] *The King* v. *Richardson and Adams*, [1948] S.C.R. 57, [1948] 2 D.L.R. 305; *Nykorak* v. *Attorney General of Canada*, [1962] S.C.R. 331, 33 D.L.R. (2d) 373; *The Queen* v. *Buchinsky*, (1983) 1 S.C.R. 481, 145 D.L.R. (3d) 1, [1983] 5 W.W.R. 577; *Attorney General of Canada* v. *Szaniszlo*, (1985) 69 B.C.L.R. 96 (S.C.); *Nugent* v. *Rosetown S. Bd.*, (1977) 77 D.L.R. (3d) 394, [1977] 5 W.W.R. 224, 2 C.C.L.T. 325 (Sask. C.A.); *Ward* v. *Jacques*, [1976] 3 W.W.R. 400 (Alta. S.C.); *Racicot* v. *Saunders*, (1979) 103 D.L.R. (3d) 567, 11 C.C.L.T. 228, 27 O.R. 15 (H. Ct.).

tially involve the protection of a derivative right.[9] They allow the employer to recover compensation for losses which, but for his actions, should have been recoverable by the employee. Modern cases, for the most part, adopt this characterization of the action *per quod*.[10] The master has not suffered a compensatable wrong as a result of his servant's injury. The master has suffered a loss insofar as he has compensated his servant for losses that were caused by the person responsible for the injury. The action, from this perspective, is largely in the nature of subrogation. The employer's cause of action is based on the rights of the injured employee.

Where a master recovers compensation for loss on some other basis than his out of pocket expenses paid to or on behalf of an employee, the nature of the action changes fundamentally. In some cases, for example, the master receives damages calculated as the value of services lost even where he no longer continues to pay wages to the injured servant.[11] In other cases, damages have been assessed as the master's loss of profit or general economic loss.[12] In cases which fall into this category the action is not derivative. It must be regarded as a right arising from a direct wrong committed against the employer.[13]

The historical origins of the action *per quod* are somewhat obscure, and it is not surprising that the courts have only recently addressed the issue of which approach to assessing damages is the gist of the action *per quod*. Speculation concerning the social conditions of feudal England at the time of the action's beginnings suggests that either approach may have been reasonable.

In feudal times, an injured servant might continue to be supported by his master, and thus suffer no economic loss as a result of his injuries.[14] Clearly, the master suffered loss because his expenses continued while services were no longer being rendered. The view that injury to a servant was an injury to the master's proprietary rights in the servant or in his services justified a direct right of action against the person responsible for causing the injury. But the action, framed in this way, would not permit the master to recover all of his *economic losses* consequent upon the injury. He could only recover those *expenses* incurred or to be incurred on behalf of the injured servant.[15]

On the other hand, the action arose after the plague years at a time when a loss of service might not be capable of mitigation by hiring a substitute.[16] In such a case the master would suffer economic loss apart from expenses incurred as a result of his servant's injuries.

The confusion concerning the proper ambit of the action continues to this day. The current law and prevailing social conditions, however, no longer appear to justify retention of the action, as the following discussion will disclose. Our examination will focus first on the action as a means of recovering general damages in the nature of economic loss, and secondly as a derivative right of recovering special damages.

---

[9] J. Irvine, "The Action Per Quod Servitium Amisit in Canada," (1980) 11 C.C.L.T. 241 at 249.

[10] *E.g.*, *Genereux*, *supra*, n. 2 at 626 (D.L.R.):

> The recovery of damages by a master in a *per quod action depends upon whether there exists in law any liability on the part of the tort feasor to the servant for any loss that servant would have suffered. Save in exceptional circumstances, the damages recoverable are the same as those which in a proper case would be recovered by the servant.*

[11] *Genereux*, *supra*, n. 2; *Chambers* v. *Miles*, [1978] 3 W.W.R. 188 (B.C.S.C.); *Martinez* v. *Gerber*, (1841) 3 Man. & G. 89, 133 E.R. 1069:

> In case per quod servitium amisit, a general allegation of service is sufficient, without stating that the servant was hired, or that he was to receive a salary.

[12] *Supra*, n. 33.

[13] The employee is, essentially, treated as a capital asset, injury to which results in economic loss, which is fully recoverable: *see* K.W. Thornicroft, "Collateral Benefits - A British Columbia Up-Date," *(1984) 42* Adv. *661*, *664-5*.

[14] A.G. Guest, "Comment," (1956) 34 C.B. Rev. 1078, 1080; Hansen & Mullan, *supra*, n. 1 at 223.

[15] We can only speculate as to what damages were recoverable, as the earliest cases shed very little light on this aspect of the *per quod action*.

[16] G.H. Jones, "Per Quod Servitium Amisit," (1958) 74 L.Q.R. 39.

1. Should the Action Protect the Employer's Economic Interests?

It was mentioned in the preceding discussion that some legal debate has arisen concerning whether the ambit of the action should embrace recovery of the employer's economic loss generally.

The general rule against recovery for purely economic loss is closely related to the rule against protection of relational interests. Recovery has long been allowed if a person's loss is the result of physical damage to himself or his property.[17] For example, the cost of medical expenses, repairs, lost earnings and loss of profits resulting from such damage are recoverable. Other losses not stemming from physical damage, however, are not recoverable:[18]

> Prior to 1963, a rule denying liability in negligence for purely economic loss — economic loss which is not consequential upon physical injury to the plaintiff's own person or property — had been applied consistently for almost ninety years. Because a single incident may cause foreseeable economic loss of vast amount to a very large number of persons, it was felt that to allow victims of purely economic loss to recover in a negligence action by application of normal principles would impose a burden of liability on defendants out of all proportion to their culpability, result in unwarranted curtailment of productive activity, and lead to a multiplicity of litigation arising out of a single event which could present serious administrative problems for the courts. The courts have never objected to recovery of economic loss per se. A person who suffers physical injury to his person or property may recover foreseeable consequential economic loss which flows from that physical damage. A party who suffers no physical damage may be able to recover economic loss from a negligent defendant indirectly by application of the doctrines of subrogation or indemnity. However, in each case the volume of litigation and the extent of the defendant's liability arising out of a single incident is limited by the requirement that an action be brought only in the name of, and for the amount of economic loss suffered by, a victim of physical damage caused by the defendant's negligence.

The scope of recovery for economic loss *not* consequent on physical damage has been expanding in Canada, but cautiously. Such recovery is still limited to financial loss caused by reliance on negligent misrepresentations,[19] and "economic loss resulting directly from avoidance of threatened physical harm to property and person."[20] Rights of recovery are limited for the most part because judges fear "liability in an indeterminate amount for an indeterminate time to an indeterminate class."[21]

If the action *per quod* were viewed as a means of recovering economic loss suffered as a result of an employee's injury, modern analysis would suggest that the gist of the action was interference with contractual relations. Intentional interference with contractual relations is actionable.[22] The law, however, has not yet recognized that negligent interference with contractual relations should justify a remedy.[23] Losses arising in that way are generally considered too remote or unforeseeable to be recoverable.[24]

Loss of services is a slim peg to hang an exception to the general rules governing the recovery of economic loss. The tendency of modern courts to

---

[17] *Cattle* v. *Stockton Waterworks*, [1875] L.J. Rep. 139, L.R. 10 Q.B. 453.

[18] J.A. Smillie, "Negligence and Economic Loss," (1982) 32 U. of T.L.J. 231, 231-32.

[19] *Hedley Byrne* v. *Heller*, [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).

[20] *Rivtow Marine Ltd.* v. *Washington Iron Works*, [1974] S.C.R. 1189, 40 D.L.R. (3d) 530, [1973] 6 W.W.R. 692; *City of Kamloops* v. *Nielsen*, [1984] 2 S.C.R. 2, (1984) 10 D.L.R. 641, [1984] 5 W.W.R. 1.

[21] *Ultramares Corp.* v. *Touche*, (1931) 255 N.Y. 170, 179 *per Cardozo J.*

[22] Fleming, *supra*, n. 2 at 682; W. Prosser, *Handbook of The Law of Torts*, (3d ed., 1964) 962.

[23] In *Nicholls* v. *Richmond*, [1983] 4 W.W.R. 169, 43 B.C.L.R. 162 (C.A.), however, the British Columbia Court of Appeal strongly suggested that in some circumstances economic loss arising from negligent interference with contractual relations may be recoverable. The defendant had moved to strike this aspect of the plaintiff's pleadings on the ground that it failed to disclose a cause of action.

[24] Fleming, *supra*, n. 2 at 682.

restrict the action *per quod* to the recovery of special damages would appear to be appropriate. That the action *per quod* may have the potential to permit recovery of economic loss is insufficient justification for its retention.

2. Is There A Need For An Action Akin to Subrogation In This Context?

(a) The Collateral Benefits Rule

When courts make an award to a plaintiff injured by the negligence of another, the aim is to compensate the plaintiff fully for his loss. In some circumstances, the plaintiff has already recovered certain sums which reduce his loss. These might include insurance payments, workmen's compensation or private disability benefits, or benevolent payments from friends or the public (*ex gratia* payments). These are collateral benefits — "benefits accruing to the plaintiff which would not have accrued but for the tort."[25]

In Canada, an issue with which the courts have struggled for decades is the extent to which collateral benefits should be taken into account when calculating loss. Since *Boarelli* v. *Flannigan*,[26] however, most collateral benefits have not been deducted from an award of damages.[27] Insurance,[28] pension,[29] disability benefits,[30] social welfare[31] and *ex gratia*[32] payments are clearly not deductible benefits. In considering the action *per quod*, the concern is with payments originating from the workplace. Their deductibility depends on their characterization by the courts.[33]

(b) Benefits Derived From the Workplace

If a collateral benefit is characterized as a continuation of wages, not in the nature of insurance, it is deductible from the victim's damage award.[34] For example, in actions involving the Canadian Armed Forces the wages paid to injured servicemen were considered to be deductible.[35] The characterization of the continued wages as true wages, as opposed to an insurance benefit, depends on the contractual arrangements governing the payment:[36]

> In the case at bar the injured employee was entitled under the Queen's orders and regulations to receive his regular wages notwithstanding his disability. These provisions state that the wages of an officer or member of Her Majesty's regular forces commences on the day of his enrolment and cease at the end of the day on which he is released or is transferred from the regular forces . . . in this case the payment of $4,866.94 to the injured serviceman was clearly a continuation of his regular wages and would have been deducted in the assessment of his damages.

Wages which continue regardless of an employee's ability to work are deducted from his award. The rationale for deduction seems to be that under

---

[25] P.S. Atiyah, "Collateral Benefits Again," (1969) 32 Mod. L. Rev. 397.

[26] 36 D.L.R. (3d) 4, [1973] 3 O.R. 69 (C.A.).

[27] J. Irvine, "An Overview of Collateral Benefits," (1980) 13 C.C.L.T. 289, 290.

[28] *Bradburn* v. *Great Western Ry.*, (1874) L.R. 10 Exch. 1, [1874-80] All E.R. Rep. 195; Irvine, *supra*, n. 27 at 291; Waddams, *supra*, n. 1 at 280-1.

[29] *Parry* v. *Cleaver*, [1970] A.C. 1, [1969] 1 All E.R. 555 (H.L.); *Canadian Pacific Ltd.* v. *Gill*, [1973] S.C.R. 654, 37 D.L.R. (3d) 229; *Guy* v. *Trizec Equities Ltd.*, [1979] 2 S.C.R. 756, 99 D.L.R. (3d) 243.

[30] *Parry* v. *Cleaver*, *supra*, n. 29; *Guy* v. *Trizec Equities Ltd.*, *supra*, n. 29; *Pettipas* v. *Roop*, (1980) 112 D.L.R. (3d) 567, 13 C.C.L.T. 281 (N.S.S.C.).

[31] *Redpath* v. *Belfast and County Down Ry.*, [1947] N.I. 167; *Boarelli* v. *Flannigan*, *supra*, n. 26; Waddams, *supra*, n. 1 at 285.

[32] *Admiralty Com'rs* v. *S.S. "Amerika"*, [1917] A.C. 38, 60, [1916-17] All E.R. Rep. 177.

[33] *Chan* v. *Butcher*, (1984) 11 D.L.R. (4th) 233, [1984] 4 W.W.R. 363, 51 B.C.L.R. 337 (C.A.); *Zalameda* v. *Piggozzo*, (1976) 74 D.L.R (3d) 522, 14 O.R. (2d) 716, 25 Chitty's L.J. 198 (H. Ct.); *Henderson* v. *Vaillancourt*, (1979) 94 D.L.R. (3d) 670, [1979] 1 W.W.R. 345, 13 A.R. 345 (C.A.).

[34] *Zanic* v. *Antrobus*, (1983) 51 B.C.L.R. 332, 335 (C.A.); *Chan* v. *Butcher*, *supra*, n. 33 at 342 (B.C.L.R.); *Attorney General of Canada* v. *Szaniszlo*, *supra*, n. 8 at 101.

[35] *The King* v. *Richardson and Adams*, *supra*, n. 8; *Nykorak* v. *Attorney General of Canada*, *supra*, n. 8; *The Queen* v. *Buchinsky*, *supra*, n. 8; *Attorney General* v. *Szaniszlo*, *supra*, n. 8.

[36] *Attorney General of Canada* v. *Szaniszlo*, *supra*, n. 8 at 101-2.

the particular head of damages, the employee has suffered no loss.[37] Conversely, the employer, obliged to continue wages despite the incapacitation of his employee, is entitled to recover those wages from the tortfeasor who was responsible for the loss of services. The action *per quod* ensures that the party actually suffering loss recoups that loss from the tortfeasor. There are, however, other ways to effect the same result.

Workplace benefits are increasingly likely to be characterized by British Columbia courts as insurance payments. In *Davidson* v. *Pun*,[38] for example, employer sponsored disability benefits were not deducted from the employee's damage award. In *Chan* v. *Butcher*[39] the court emphasized that the proper characterization of benefits depends not on their source but on their intrinsic nature. The court held that, in this case, continued wages, paid out of the employer's own funds to an injured employee,[40] were in the nature of insurance — self-insured benefits:[41]

> The plan under which the benefits are payable need not necessarily resemble the ordinary contract of insurance. . . . But, as Lord Pearce observed in *Parry* v. *Cleaver*, at p. 37, it is sufficient if the character of the payments is the same as those derived from private insurance, namely, "they are intended by the payor and the payee to benefit the workman and not to be a subvention for wrongdoers who will cause him damage."

The court found that, although there was no disability plan *per se*, and no direct contributions had been made by the employee, the employee paid for the scheme indirectly, whether through lower wages or poorer working conditions.[42] There is always some trade-off for employer-sponsored benefits. As Dubin J.A. stated in *Boarelli* v. *Flannigan*:[43]

> [W]ith respect to collateral benefits obtained, pursuant to collective bargaining agreements or private contracts of employment, I would view such benefits as part of the wage package and the benefits received as having been paid for by the employee, and I do not think that they should be treated any differently than a benefit received from a private insurance plan.

(c) Wages

The emerging view of the proper operation of the collateral benefits rule may well reach the point where continued wages will not be taken into account when calculating an injured person's damages.[44] This kind of benefit would not appear to differ in any material way from benefits which are in the nature of insurance. Moreover, few arguments can be raised in support of permitting

---

[37] *Chan* v. *Butcher*, *supra*, n. 33 at 343; *per* MacFarland J.A.:

> [I]f the loss of wages is replaced in pari materia by an equivalent benefit which in effect is a continuation of the salary, there is no loss and there can be no recovery against a wrongdoer for lost wages.

Note that the judgment goes on to say:

> [O]nce the disability benefits have been characterized as in the nature of insurance, and not in the nature of wages, then the benefits are not in pari materia, and one is not to be deducted from the other. It is not wages for wages which is under consideration but insurance proceeds and loss of wages.

[38] *Davidson* v. *Pun*, (1984) 57 B.C.L.R. 240, 30 C.C.L.T. 316 (C.A.).

[39] (1984) 11 D.L.R. (4th) 233, [1984] 4 W.W.R. 363, 51 B.C.L.R. 337 (C.A.). *See Parry* v. *Cleaver*, *supra*, n. 29 at 559 (All E.R.) *per* Lord Reid.

[40] It should be noted that in both *Chan* v. *Butcher*, *supra*, n. 39, and *Davidson* v. *Pun*, *supra*, n. 38, the employer-sponsored disability plans were short term: in the former case, benefits lasted for a maximum of one year and in the latter, duration of the benefits was based on duration of employment.

[41] *Chan* v. *Butcher*, *supra*, n. 39 at 342 (B.C.L.R.).

[42] *McPherson* v. *Gibson*, (1984) 51 B.C.L.R. 321, 324 (S.C.); *Chan* v. *Butcher*, *supra*, n. 39 at 338-39 (B.C.L.R.).

[43] *Boarelli* v. *Flannigan*, *supra*, n. 26 at 14 (D.L.R.).

[44] *Chan* v. *Butcher*, *supra*, n. 39 at 341 (B.C.L.R.):

> The cases reveal that the principle under consideration is rooted in public policy and in fairness. The wrongdoer ought not to have the benefit of the protection which the victim has provided for herself, by way of insurance, or by way of previous contractual arrangements made for her own benefit, not the tortfeasor's. The wrongdoer ought not to have the benefit of that which has been provided to the employee by reason of private or public benevolence, or, in particular, by her employer who has agreed, in addition to paying her wages, to protect her against risk of unemployment due to illness or accident for a limited period. Another aspect of the matter is that the victim ought not to be compensated twice for the same loss. This has troubled both judges and commmentators. But there can be no ground for complaint if the employee has paid, directly or indirectly, for the benefits.

the tortfeasor to receive the benefit of his victim's private contractual arrangements.

In *Attorney General of Canada* v. *Szaniszlo*,[45] McEachern C.J.S.C. was concerned with the relationship between the action *per quod* and the manner in which collateral benefits are treated when assessing a victim's damages. The manner in which the collateral benefits rule has developed is consistent with modern policy. The law's concern is to ensure that the victim is made whole, so far as an award of damages may accomplish that. The action *per quod* is inconsistent with that policy but has not been revised by the courts as other areas of the law have altered. For example, in some cases both master (under the action *per quod*) and the servant (by the operation of the collateral benefits rule) may recover the cost of medical expenses from the tortfeasor.[46] Double recovery in this respect is difficult to justify.

It has been suggested that the existence of the *per quod* action is the very reason why wages are deductible under the collateral benefits rule;[47] otherwise, there would be recovery by both employer and employee for the same damages from the tortfeasor. At present, the collateral benefits rule prevents such double recovery of wages.[48] Recent developments with respect to the manner in which collateral benefits are to be treated have largely removed any justification for the continuation of the action *per quod*.

C. The Need For the Action *Per Quod*

The action *per quod* is rarely brought. This suggests that either an employer seldom suffers loss recoverable under that action, or other areas of the law already provide adequate redress. Both explanations appear to be valid.

There are few circumstances where an employer continues to pay wages to an employee who is unable to work because of injuries. Any continuation of wages is usually in the form of insurance, so that the employee in his own right is able to recover from the person who injured him. If benefits received are to be recoverable, in the event the employee is compensated by the person who injured him, that will be governed by agreement between the employee and the person paying the benefits.[49] Alternatively, an award could be made to the employee on behalf of the employer.[50]

As we mentioned earlier, the manner in which the collateral benefits rule has developed suggests that there will be few if any cases where benefits received by an employee will prevent recovery from the tortfeasor. In those few cases where the collateral benefits rule would limit the employee's rights of recovery, it is open to the employer and employee to structure the arrangement so that the employer will be subrogated to the employee's claim.[51]

---

[45] *Supra*, n. 8 at 102-4.

[46] These cases, all involving the Armed Forces, are outlined in *Attorney General of Canada* v. *Szaniszlo*, *supra*, n. 8, at 103 (B.C.L.R.).

[47] *Treloar* v. *Wickson*, (1961) 105 C.L.R. 102, 122 (Aust. H.C.). *Also see A.G. Can.* v. *Jackson*, [1946] 2 D.L.R. 484.

[48] If a benefit is characterized as wages, the employer can recover from the tortfeasor but the employee cannot. If a payment or benefit from the workplace is characterized as insurance, the employee may recover but the employer cannot, because the obligation of the employer to compensate the employee is ascribed to an independent cause anterior in origin to any act of the tortfeasor. *See The King* v. *C.P.R.*, [1947] S.C.R. 185, 61 C.R.T.C. 24, [1947] 2 D.L.R. 1, 13-14; Irvine, *supra*, n. 9 at 253; *A.G. Can.* v. *Szaniszlo*, *supra*, n. 8 at 102-3; *Davidson* v. *Pun*, *supra*, n. 38 at 320.

[49] *Thornicraft*, *supra*, n. 13 at 667; Irvine, *supra*, n. 27 at 295-96.

[50] Such an arrangement is available where a third person renders gratuitous services to an injured person even if there is no legal obligation to pay for those services: *see Donnelly* v. *Joyce*, [1974] Q.B. 454, [1973] 3 All E.R. 475 (C.A.); followed in *Thornton* v. *Prince George School Board*, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480, 83 D.L.. (3d) 480, [1978] 1 W.W.R. 607, 19 N.R. 552, 3 C.C.L.T. 257; *Arnold* v. *Teno*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609, 19 N.R. 1, 3 C.C.L.T. 272. Similarly, it is arguable that an award to an employee on behalf of an employer is appropriate even when there is no legal obligation to repay workplace benefits.

[51] *Thornicraft*, *supra*, n. 13 at 667. For an example of creative subrogation, *see A.G. Can. and Nachbaur* v. *Ahenakew*, [1986] 4 W.W.R. 230 (Sask. C.A.).

Where an employee renders services at less than their market value, at first glance it would appear that the employer would be deprived of a valuable remedy if unable to pursue an action *per quod*.[52] Moreover, it would appear that, unless the employer is able to bring such an action, the tortfeasor will to that extent be relieved from his liability to contribute.

In the last several years, however, the courts have been more willing to award damages for lost earning capacity where a person was performing services for less than their market value.[53] In the family context, for example, the spouse who renders homemaking services will receive compensation for lost earning capacity.[54] In principle, that is as it should be. The husband's inability to recover damages for lost services has probably assisted the courts in furthering the policy of adequately compensating the victim rather than relational interests.[55]

D. Summary

It would appear that even in a commercial context, the action *per quod* performs a very limited function. Other developments in the law, particularly the collateral benefits rule and the awarding of damages for lost earning capacity, have largely removed any need for the action *per quod*. In those limited cases where the action is relied upon, it would appear that contractual rights of subrogation or indemnity, or the injured person's ability to recover on behalf of another, provide adequate protection to an employer.

---

[52] *Genereux*, *supra*, n. 2; *Chamber v. Miles*, *supra*, n. 10.

[53] Waddams, *supra*, n. 1 at 233-38; *Turenne v. Chung*, (1962) 40 W.W.R. 508 (Man. C.A.).

[54] *Daly v. General Steam Navigation Co. Ltd.*, [1981] 1 W.L.R. 120, [1980] 3 All E.R. 696, [1979] 2 Lloyd's Rep. 179 (C.A.); *Fenn v. City of Peterborough*, (1979) 104 D.L.R. (3d) 174, 25 O.R. (2d) 399 (C.A.), *aff'd.* on another point (1981) 2 S.C.R. 613, 129 D.L.R. (3d) 507.

[55] Waddams, *supra*, n. 1 at 234.

A. Recommendation

Although the action *per quod* has undergone some transitions since the middle ages, it is still tainted by its ignominious origins and is regarded with much distaste by modern courts.

There is consensus among judges, academics and other commentators that the action is in need of reform. The English Law Reform Committee made the following observation:[1]

> Any employer who has incurred expense in consequence of a tortious injury done to his employee should be entitled to be reimbursed to the extent that the wrongdoer's liability to the employee has thereby been reduced. The right to reimbursement should depend on whether the employee would, but for the action of the employer, be entitled to recover damages from the wrongdoer in respect to the matters covered by the payment made, or expenses incurred, by his employer.

This conclusion is based, not on the proximity of the employer to the tortfeasor, or on a duty owed, but on the principle that a person incurring an expense in order to mitigate the loss or injury of another should be entitled to reimbursement.[2] In British Columbia today, the employee is entitled to recover his own losses in virtually all cases. The original functions of the action *per quod* are being fulfilled by other means more consistent with the general principles of modern tort law. The action *per quod*, consequently, need not be retained.[3]

The Commission recommends that:

No action should be maintainable for damages for loss of servitium, *and without restricting the generality of the foregoing, the action* per quod servitium amisit *should be abolished.*

B. Acknowledgments

For most projects, before proceeding to Report, the usual practise of the Commission is to prepare a Working Paper. A Working Paper will discuss the law and the Commission's tentative proposals for reform, and be given wide circulation for comment and criticism.

We have departed from that practise for this project. The action *per quod* is a subject which has been thoroughly debated and studied in the past, and one which, we believe, is largely uncontroversial.

The Commission wishes to express its gratitude to Kathleen Geiger, a member of the Commission's research staff, who conducted research on this project and prepared materials which, in part, form the basis of this Report. We also wish to express our appreciation to Thomas G. Anderson, Counsel to the Commission, who, subject to the direction of the Commission, prepared this Report.

ARTHUR L. CLOSE
MARY V. NEWBURY
LYMAN R. ROBINSON
PETER T. BURNS

November 21, 1986

---

[1] English Law Reform Committee, Eleventh Report *Loss of Services, etc.*, (1963) Cmnd. 2017, 4.

[2] *Ibid.*, at 4-5.

[3] This conclusion is consistent with recommendations made by the Commission in *Report on Intentional Interference With Domestic Relations*, (LRC 68, 1983).